

**OPINION
66-233**

September 8, 1966 (OPINION)

Honorable William L. Guy

Governor

RE: State - Officers - Report to the Governor

This is in reply to your letter of August 30, 1966, relative to section 44-04-08 of the North Dakota Century Code, as amended by the 1965 Legislative Assembly.

You note the following facts and ask the following questions:

A number of questions have been asked about this 1965 amendment. Presumably the list mentioned would be included in the biennial reports, the next publication of which will cover the two year period ended on June 30, 1966. This biennial report actually covers the last fiscal year of the 1963-1965 biennium and the first fiscal year of the 1965-1967 biennium insofar as the word 'biennium' is commonly used as relating to the two year period for which appropriations are made.

Some of the questions that have been raised about this 1965 amendment include the following:

1. Should this list of persons include every individual who was employed at any time during the two year period ended June 30, 1966, even though some of them may have been employed as part time or temporary help and even though some of them whether full time or not, are no longer in the employ of a department on June 30, 1965.
2. Should the published list of persons be limited to those who are actually employed on June 30, 1966, since that is the last date covered by the biennial report even though it is not compiled and published until later in the year 1966?
3. Does the term 'emoluments' include such payments as:
 - a. Mileage for use of personal car?
 - b. Reimbursement for the price of airplane or railroad tickets?
 - c. Per diem payments for meals and lodging?
 - d. The five dollars per month per employee that is paid by the state for medical insurance coverage and which is not reported on the Federal W-2's as salary to the employees?
 - e. The amount of social security taxes paid by the state

as employer of each person named in the list?

- f. The amount of matching payments made under the state employees retirement program by the employing agency pursuant to Section 54-52-07, N.D.C.C. 1965 Suppl.? Since these payments will not start until July, 1966, the answer to the questions presumably would not be necessary for the preparation of the department's 1964-1966 fiscal biennial report, unless the list of employees and their salaries that is to be included in the 1964-1966 report would relate to a date after June 30, 1966."

As you have noted in your letter, section 44-04-08 of the North Dakota Century Code, as amended by Section 77 of Chapter 203 of the 1965 Session Laws provides:

44-04-08. DUTY OF THE HEADS OF STATE INSTITUTIONS AND STATE BOARDS, DEPARTMENTS, OR OFFICES TO MAKE REPORTS. The head of each institution and each state board, department, or office shall set forth, in the annual or biennial report required by law, a list of all persons in the employ of the institution, department, office, or board. Such list shall give the name of each person drawing a salary at such institution, from such board, department, or office, the amount of salary and other emoluments drawn, the fund or funds from which drawn, and the number of installments per annum in which such salary is drawn."

Prior to the 1965 amendment, the section required such reports only of the heads of State institutions and State boards. The amendment consisted of adding departments or offices to the requirement. No substantive changes were made in the information required. This section was originally enacted in 1913. The amendment to the section was a part of Chapter 203 of the 1965 Session Laws which had for its primary purpose the transferring of the administration and control of the State Hospital from the Board of Administration to the Mental Health and Retardation Division of the State Department of Health. The purpose of amending section 44-04-08 would appear to be to require the Health Department to make the same report relative to the State Hospital as was required from the Board of Administration. However the inclusion of the terms "departments or offices" would also appear to broaden the scope of those agencies included within this section considerably. In other words, the section no longer is limited to heads of State institutions and State boards, but covers all departments or offices required to make reports as well. The section does not, of itself, require the making of the report but refers only to those heads of State institutions, State boards, departments or offices which are required by other statutes to make such reports. The statute governs only the contents of the report. In direct response to your first two questions:

1. It is our opinion that the report, in order to be complete, should include every individual who was employed at any time during the two year period ended June 30, 1966, even though some of them may have been employed only as part time or temporary help, and even though some of them,

whether full time or not, are no longer in the employ of a department on June 30, 1966. The intent of the requirement, in our opinion, is that the report indicate every person employed by the institution, board, department or office during the two year period of the report whether they were employed for the complete two year period or not.

As you have noted in your letter, this will necessarily include those persons paid out of the current 1965-1967 appropriation as well as those who were paid out of the 1963-1965 appropriation from the period of July 1, 1964 to June 30, 1965.

2. It is our opinion that the published list of persons should be limited to those who were employed during the period of July 1, 1964 through June 30, 1966, since that is the last date covered by the biennial report, even though it is not compiled and published until later in the year 1966. Of practical necessity there must be a final date as to the information contained in the report. The statutes requiring the reports usually define the period for which they are to be made. As an example, section 54-12-05 of the North Dakota Century Code, as amended, requires the Attorney General to make a biennial report to the Governor and the Secretary of State on or before the first day of October of each even numbered year, covering the business of his office to and including the thirtieth day of June last preceding. This is the ordinary statutory requirement and, unless a statute with regard to a specific state agency requires otherwise, the information contained in the report would include only the data through June thirtieth. Subsequent data would be included in subsequent reports.
3. The term "emoluments" was defined by the North Dakota Supreme Court in *State ex rel. Lyons v. Guy*, 107 N.W.2d. 211 (1961). In that case the Supreme Court defined the term as used in section 39 of the North Dakota Constitution prohibiting a member of the legislative assembly from being elected or appointed to any civil office in this State for which the emoluments have been increased during the term for which he was elected. We believe the definition of the term "emoluments" as prescribed by the Supreme Court in that case are applicable to the term as used in section 44-04-08, as amended.

In the above mentioned case, the Court determined that provisions for expense of travel of public officers while engaged in official business or reimbursement to them for expenses of such travel are not "emoluments"; that social security benefits or contributions do not constitute "emoluments" within the constitutional prohibition. The Court cited with approval the definition of the term "emoluments" in Webster's New International Dictionary, Second Edition, as "Profit from office, employment, or labor; compensation; fees or salary." The Court noted the definition listed as obsolete the terms "advantage; benefit." Based upon the foregoing decision of the Supreme

Court, our replies to the questions listed under point number three of your letter are as follows:

- a. It is our opinion that mileage for use of personal car is not included within the term "emoluments."
- b. It is our opinion that reimbursement for the price of airplane or railroad tickets is not included within the term "emoluments."
- c. It is our opinion that per diem for meals and lodging is not included within the term "emoluments."

The theory of the Supreme Court is that the above mentioned items are reimbursement for expenses paid by the employees or officers and constitute no profit or pecuniary gain.

- d. It is our opinion that the five dollars per month per employee that is paid by the State for medical insurance coverage and which is not reported on the Federal W-2's as salary to the employees would be considered "emoluments" since the benefits are not remote or contingent. See Page No. 219 of the Lyons case, supra.
- e. It is our opinion the amount of social security taxes paid by the State as employer of each person named in the list are not an "emolument." The point was specifically ruled upon by the Supreme Court in the Lyons case, supra, at Page No. 219.
- f. It is our opinion that the amount of matching payments made under the State Employees' Retirement Program by the employing agency pursuant to section 54-52-07 of the North Dakota Century Code, as amended, is not an "emolument" within the meaning of section 44-04-08, as amended. In the first instance the program is mandatory for new employees (after a prescribed period of service for the State) and in this respect resembles social security payments which the Court, in the Lyons case, held were not emoluments. We would also note that the amount of State matching payments which the employee is entitled to is dependent upon the length of service to the State. Thus the payments are not direct but contingent upon the length of service. While the matching payments are made for the employee by the State, whether the employee will receive any of these payments, or if he does receive them, what percentage he will receive, is contingent upon his length of service.

HELGI JOHANNESON

Attorney General